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In the

Supreme Court of the United States

October Term, 1970

No. 1319

City of Lackawanna, New York, *et al.*,

Petitioner,

vs.

Kennedy Park Homes Association Incorporated, Colored People's Civic and Political Organization, Inc., James M. Thomas, Samuel Martin, The Diocese of Buffalo, N.Y.,

Respondents,

United States of America,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS KENNEDY PARK HOMES ASSOCIATION, COLORED PEOPLE'S CIVIC AND POLITICAL ORGANIZATION, INC., JAMES M. THOMAS AND SAMUEL MARTIN IN OPPOSITION

Jack Greenberg
James M. Nabrit III
Jeffry A. Mintz
Morris J. Baller
10 Columbus Circle
New York, New York 10019

Will. Gibson
110 Pearl Street
Buffalo, New York 14202

Attorneys for Named Respondents

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
A. Facts	2
B. Proceedings Below	5
Argument	8
Conclusion	13

Table of Authorities

Cases:

Arrington v. City of Fairfield, 414 F.2d 667 (5th Cir. 1969) 9

Berenyi v. District Director, Immigration Service, 385 U.S. 630 (1967) 9

Brown v. Board of Education, 349 U.S. 294 (1955) 9

Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) 9

Gautreaux v. Chicago Housing Authority, — F.2d —, (7th Cir. No. 18691, December 16, 1970) 9, 11

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 9

Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964) 9, 11

Page

Hawkins v. Town of Shaw, —— F.2d —— (5th Cir. No. 29013, January 28, 1971) 9
Hecht Company v. Bowles, 321 U.S. 321 (1944) 11
Hunter v. Erickson, 393 U.S. 385 (1969) 9

Kennedy Park Homes Association v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970) ..... passim
Kennedy Park Homes Association v. City of Lackawanna, — F.2d — (2nd Cir. No. 35320, December 7, 1970) ..... passim

Louisiana v. United States, 380 U.S. 145 (1965) 9, 11

Meredith v. Winter Haven, 320 U.S. 228 (1943) 11
Mills v. Electric Auto-Lite Co., 396 U.S. 376 (1970) 11

Norwalk CORE v. Norwalk Redevelopment Authority, 395 F.2d 920 (2nd Cir. 1968) 9

Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970) 9

United States v. First National City Bank, 379 U.S. 378 (1965) 11
United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd with modifications, 380 F.2d 385 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967) 11
United States v. Yellow Cab Co., 338 U.S. 338 (1949) 9

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 9, 11

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) 8-9

PAGE

Constitutional and Statutory Provisions:

United States Constitution, Fourteenth Amendment, Equal Protection Clause 6

Civil Rights Act of 1870, 42 U.S.C. §1983 6

Fair Housing Act of 1968, 42 U.S.C. §3601 6

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Opinions Below

The decision and order of the United States District Court for the Northern District of New York (Pet. App. 33-93) is reported at 318 F. Supp. 663. The decision of the United States Court of Appeals for the Second Circuit (Pet. App. 17-32) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 7, 1970. The petition for a writ of certiorari was filed on February 5, 1971. The jurisdiction of the court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Are the concurrent findings of fact of the courts below that the respondents engaged in intentional racial discrimination clearly erroneous?

2. On the facts as found below, were the respondents entitled to judicial relief?

3. Was the decree issued by the District Court and affirmed by the Court of Appeals appropriate?

Statement

A. Facts

This case arises out of an effort by respondent Colored People's Civic and Political Organization (CPCPO), a group of black citizens residing in a ghetto area of the First Ward of the City of Lackawanna, New York, to construct homes in a nearly all-white area of the City. Early in 1968 CPCPO began to act with determination to seek new housing away from the deteriorating and overcrowded First Ward to which Negroes had been traditionally confined. (Pet. App. 66-69, 86-88, 318 F. Supp. 685-688, 694-695.) It formed respondent Kennedy Park Homes Association (KPHA), a non-profit housing corporation, and obtained a commitment from co-respondent Diocese of Buffalo to purchase 30 acres of vacant land owned by the

Diocese in the City's nearly all-white Third Ward for a subdivision of low-cost homes. KPHA then secured Federal Housing Administration approval for the federal mortgage assistance. Shortly thereafter, responding to pressure from its white citizens, the City began a continuing campaign to block the subdivision. (Pet. App. 68-77, 318 F. Supp. 686-690.) These actions can be better understood when considered against the background of housing conditions in and land use policies of the City.

Both courts below found flagrant, racially distinguishable disparities between the housing opportunities available to the City's white and black citizens respectively. (District Court: Pet. App. 40-44, 318 F. Supp. 674-675; Court of Appeals: Pet. App. 19-21.) First, Lackawanna's residential neighborhoods are rigidly segregated.[1] The First Ward, in which nearly all Lackawanna's black residents are confined, is physically separated from the remainder of Lackawanna by railroad tracks crossed by a single bridge. (Pet. App. 40-41, 318 F. Supp. 674.) Second, the First Ward offers by far the least desirable living conditions among Lackawanna's different areas. Its housing stock is old, crowded, and substandard; its health and crime statistics are the City's worst. (Pet. App. 43, 318 F. Supp. 675.)[2] Third, private discrimination has prevented blacks from escaping deplorable First Ward condi-

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[1] Of the City's 2,893 non-white residents, 99.9% lived in the First Ward in 1966. (Pet. App. 41, 318 F. Supp. 674.) The concentration of non-whites in the First Ward is increasing. (*Id.*) Only one non-white was found among the 6,974 Second Ward residents. (*Id.*) There were 29 non-whites (0.2%) in the 1966 Third Ward population of 12,329. (*Id.*)

[2] The quality of the First Ward environment is further diminished by the immense Bethlehem Steel works, including blast furnaces and open hearths, which occupy the northern half of the Ward—the area adjacent to the black ghetto. (Pet. App. 41-42, 318 F. Supp. 674-675.)

tions by barring them from housing in the Third Ward, the only area where any significant new residential construction or other housing opportunities have occurred in recent years. Contractors, homeowners, realtors, and subdividers have all participated in such private discrimination, which has been well known to City officials. (Pet. App. 55, 318 F. Supp. 688.)

All parties concede that the City has a serious sewage problem resulting from grossly inadequate sewer and sewage treatment facilities. The City has been aware of the problem for many years, but has completely disregarded nearly all recommendations as to solutions of the problem, has failed to execute recommended studies, and prior to 1969 had made no effort to limit the use of the already overtaxed system. (Pet. App. 55-57, 318 F. Supp. 688-691.)[1] Nevertheless, the "sewer crisis" has been and remains the major purported justification for the City's efforts to prevent the KPHA subdivision.

A second excuse raised by petitioners is the need for park land. Lackawanna has devoted some attention to the selection of a proposed park and recreation site. Following recommendations of a retained consultant, the City adopted and imbedded in its Master Plan a proposed site which was wholly located to the west of the site later acquired by KPHA from the Diocese—notwithstanding petitioners' contention that the proposed park site and the KPHA site overlapped. (Pet. App. 51, 66-67, 313 F. Supp.

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[1] In spite of the claimed "sewer crisis," the City has since 1962 approved at least nine new subdivisions and hundreds of individual homes in the Third Ward finding into the same sewers. (Pet. App. 56, 59-60, 318 F. Supp. 689-691, 692-693.) Even after adopting a supposedly general subdivision moratorium (directed mainly at KPHA, Pet. App. 66, 318 F. Supp. 695), the City permitted substantial construction to continue. (Pet. App. 60, 318 F. Supp. 692.)

679, 685.) Prior to acquisition by KPHA, its site had been shown on all plans and maps, including the zoning code, as designated for residential use. (*Id.*)

Against this backdrop, when KPHA's plans became known in 1968, a swift reaction followed. Following intensive protests against KPHA's plans by concerned "citizens' groups", the City's Planning and Development Board recommended rezoning the KPHA site for park and recreation use and imposing a moratorium on all new subdivisions. The City Council on October 21, 1968, adopted these recommendations as City ordinances. At a subsequent meeting the Council voted a resolution setting forth findings of fact and reasons for its two ordinances. The district court found these findings and reasons in various degrees to be rationalizations, or demonstrably false. (Pet. App. 86-87, 318 F. Supp. 685.)

After this action had been filed, the Council rescinded the two ordinances, leaving intact a prior resolution directing City officials to acquire the KPHA site as a park tract. However, the Mayor continued to refuse to sign the authorization to permit the subdivision to tie into the municipal sewer system (the "Sanitary 5" form), an essential prerequisite without which construction could not commence.[4]

B. Proceedings Below

The instant respondents and the Diocese of Buffalo brought this action on December 2, 1968. The United States was permitted to intervene as a plaintiff on February 5, 1969. Their complaints alleged that petitioners' actions violated the rights of racial minorities and persons of low

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[4] This form was finally signed and submitted to the county health department only after the denial of a stay of the decree by the Court of Appeals and by Mr. Justice Harlan.

income under the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1870 (42 U.S.C. §1983), and the Fair Housing Act of 1968 (42 U.S.C. §3601 et seq.) to equal access to housing. Both parties sought injunctive relief against the discriminatory acts of petitioners.

Following extensive pre-trial proceedings and discovery, a trial on the merits began in the district court on April 9, 1970, lasting 22 trial days. Thirty-two witnesses testified, and 27 depositions and 309 exhibits were entered into the record. Further oral argument was heard on July 10, 1970. On the basis of the extensive record and the parties' briefs, the district court handed down detailed findings of fact and conclusions of law. (Pet. App. 33-93, 318 F. Supp. 669.)

The district court opinion of August 13, 1970 systematically refuted every major factual contention, explanation, or justification advanced by petitioners. The court dismissed the City's justifications, which are renewed in the present petition, as unconvincing rationalizations for racially motivated conduct.[5] In summarizing its findings the court held:

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[5] "The defendants . . . have never attempted to find out whether it was possible to deal with the sewer problems and park needs without infringing upon plaintiffs' rights. There were alternative courses of action which could have been taken in regard to both of these problems, which would have solved the City's needs and not impaired the rights of the plaintiffs.

There was no justification for reserving this land for park purposes. The planning and development Board had designated it for residential use. No one recommended that it be used for park purposes either before or after the enactment of the ordinance . . .

The sewer problem did not justify the action taken by the Council in enacting the ordinance, or by the Mayor in refusing to sign the Sanitary 5 form. . . . [T]he enactment of the subdivision moratorium was not necessary or compelling and, in fact, could not solve the sewer problem. . . .

Many Third Ward and other residents have complained about the sewers for at least the last ten years. Nevertheless, during this period, the City continued to issue subdivision and building per-

> Therefore, considering all of the evidence and especially the actions of the City in 1968 and 1969 in their historical context . . . [a]ffirmative acts were taken under color of law to inhibit plaintiffs' constitutional and statutory rights.

(Pet. App. 67, 318 F. Supp. 625.)

In addition to finding petitioners guilty of a "wilful contrivance to deprive plaintiffs of their housing rights," the court also held that defendants had breached their affirmative duty to plan for the protection of plaintiffs' housing rights. (Pet. App. 68-69, 318 F. Supp. 626-627.) The court thereupon issued the nine-part order set forth verbatim in the Petition for Certiorari (pp. 5-6). In substance, the order required the city to cease its efforts to block the subdivision and to take all necessary steps to permit it to proceed.

Petitioners filed notice of appeal on August 17, 1970, and on September 3, 1970, obtained a stay of the order, on the strict condition that the appeal be expedited. The appeal was argued October 14, 1970, and the opinion by Mr. Justice Clark for a unanimous court was issued December 7, 1970. The Court of Appeals reviewed and explicitly affirmed the findings of fact made below. It held that those findings were "fully supported by the record and lead inescapably to the conclusion that racial motivation resulting in invidious discrimination guided the actions of the City." (Pet. App. 19.) After reviewing "the mosaic of Lackawanna's discrimination," the court concluded:

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mits without facing up to a satisfactory solution to the sewer problem. Defendant's lack of attention not only deprived the plaintiffs of an opportunity for housing, but all Lackawanna residents of an efficient sewer system." (Pet. App. 68-69, 318 F. Supp. 626.)

> This panoply of events indicates state action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation.

(Pet. App. 28.) The Court expressly concurred in the lower court's dismissal of the City's sewer and park justifications. (Pet. App. 27-29.) The court approved the remedy below, noting that the particular manner in which the City should be compelled to afford plaintiffs relief was for the district court to determine, and referring the city's requests for modification to it. (Pet. App. 30.)

Petitioners sought stays of the decree pending certiorari which were denied by the Court of Appeals on January 13, 1971, and by Mr. Justice Harlan on January 26, 1971. The petition for certiorari was filed on February 5, 1971.

ARGUMENT

Although petitioners appear to have abandoned a direct attack on the findings of fact and legal conclusions of the lower courts, their challenge to the remedy in essence invites this Court to disregard the factual and legal basis on which the decree rests. The attitude petitioners urge with respect to these findings and conclusions is clearly inappropriate.

1. The meticulously documented and detailed findings of the district court were based on a voluminous record, carefully studied. In affirming these findings, the appeals court found them not merely not "clearly erroneous" (Pet. App. 25-26), but fully supported by the record. (Pet. App. 19.)

In these circumstances this Court should not undertake to review the factual findings made below, *Zenith Radio*

Corp. v. *Hazeltine Research*, 395 U.S. 100, 123 (1969), particularly since the issues involved the design or motivation of actions, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949). Where the appellate court has affirmatively concurred in the findings of the trier of the fact, such review is particularly inappropriate, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 542 (1937); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *District Director, Immigration Service*, 385 U.S. 630, 635 (1967).

2. In light of these findings, it is apparent that no novel or important questions of law are presented. This Court has granted injunctions and affirmative relief against intentional acts of racial discrimination by governmental units or officials on innumerable occasions, and there can no longer be any question as to the propriety of judicial relief for such actions. See, e.g. *Brown* v. *Board of Education*, 349 U.S. 294 (1955); *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Louisiana* v. *United States*, 380 U.S. 145 (1965). Nor is there any conflict among the Circuits regarding the illegality of intentional discrimination which deprives racial minorities of equal housing opportunities. See, e.g., *Dailey* v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Gautreaux* v. *Chicago Housing Authority*, —— F.2d —— (7th Cir. No. 18681, Dec. 16, 1970); *cf. Arrington* v. *City of Fairfield*, 414 F.2d 687 (5th Cir. 1969); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968).[4]

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[4] Where the *effect* of governmental action is to deny equal opportunities to minority groups, it has been held that it is not necessary, as was done here, to find a discriminatory motive. *Haskins* v. *Town of Shaw*, —— F.2d —— (5th Cir. No. 29013, January 28, 1971); *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

3. Petitioners' principal grounds amount to an enumeration of the sweeping provisions of the district court's remedy, coupled with fearful prophecies of its possible consequences. Petitioners both exaggerate and distort the district court's decree when they claim it authorizes the court "virtually taking over and running a City" (Pet. 6) and "to administer the City's affairs rather than its elected officials." (Pet. 6.) The City need only remove the stumbling block which it has discriminatorily raised against KPHA alone, by executing the necessary "Sanitary 5" form authorizing a sewer connection, and forwarding it to the county health department for competent review.[7] Petitioners express alarm about the injunction against issuance of any further building permits in the Second or Third Wards which would feed into the municipal sewage system until KPHA is allowed to tap into the sewer system. (Pet. 6-13). Yet this injunction does no more than require the City to fulfill its existing obligations on a non-discriminatory basis.[8]

We submit that the district court's decree is entirely proper and within its equitable powers. It is well established that the formulation of a decree by a court of equity will not be disturbed absent a clear abuse of the chancellor's

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[7] Only if the County disapproves the executed form need petitioners "take whatever action is necessary to provide adequate sewage service to the KPHA subdivision." (Pet. App. 91.) If needed, the development of an adequate sewer system will benefit all residents of the Third Ward, black and white alike.

[8] Lackawanna has always had a duty to provide adequate sewage facilities for the Third Ward. To attribute this obligation to the district court's decree would appear to compound past dereliction of duty by present denial of the municipality's *raison d'etre*. The court's decree leaves the method of resolving the "sewer crisis" appropriately in the hands of city officials. The injunction against further building pending steps toward resolution of the difficulty simply applies petitioners' concern about the sewers to all potential builders, black and white alike.

broad discretion,[9] particularly when the decree is designed to further the public interest rather than a purely private claim.[10] The necessity for judicial intervention is particularly appropriate where a history of intentional racial discrimination exists. The Courts below followed the rule of *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), that:

> The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

In this light, the decree goes beyond neither what seems reasonably necessary in light of the petitioners' clearly discriminatory intent and their continuing intransigence, as shown by the facts, nor the scope of decrees in analogous cases.[11]

Even if the decree is open to some challenge or modification, this Court is not the proper forum. The district court's order specifically directed petitioners to report to it on the progress and problems of KPHA's sewage services, and retained continuing jurisdiction over the matter. (Pet. App. 92, 318 F. Supp. at 698.) The appeals court directed that requests for modification should be addressed in the first instance to the district court. (Pet. App. 19, 30.)

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[9] *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 376, 386 (1970); *Hecht Company* v. *Bowles*, 321 U.S. 321, 329 (1944); *Meredith* v. *Winter Haven*, 320 U.S. 228, 235 (1943).

[10] *United States* v. *First National City Bank*, 379 U.S. 378, 383 (1965); *Virginia Ry. Co.* v. *System Federation*, *supra* at 552. *Cf. Griffin* v. *School Board of Prince Edward County*, *supra*, at 233-234.

[11] *See, e.g., Griffin* v. *Prince Edward County School Board*, *supra*; *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd with modifications* 380 F.2d 385 (5th Cir. 1967), *cert. denied* 389 U.S. 840 (196..); *Gautreaux* v. *Chicago Housing Authority*, *supra*.

We also would note that the great complexity of the evidence and the care and diligence with which the district court has already inquired into these problems render the district court particularly qualified to consider the propriety of its decree in specific factual circumstances as they may develop. Indeed, respondents respectfully suggest that this Court could not properly evaluate petitioners' spectres and contentions composed exclusively of hypothetical future eventualities. Further evidentiary hearings are available, if needed, under the decree for Lackawanna to produce real evidence in support of the possibilities it raises in the petition. The district court will remain available to consider petitioners' assertions, which as of now are still unfounded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respondents further request the Court to expedite consideration of this case for the following reasons: While preliminary matters involved in the proposed development are now proceeding, KPHA will be unable to obtain financing for construction while this litigation is pending. The City is of course entitled to the full consideration in this Court of the issues raised in its petition. However, the respondents' efforts to obtain decent housing have now been delayed two years by actions found by the lower courts to have been discriminatorily motivated. The realities of the short construction season in nothern New York will mean possibly another year's delay unless consideration is expedited.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT III
JEFFRY A. MINTZ
MORRIS J. BALLER
10 Columbus Circle
New York, New York 10019

WILL GUNDOX
110 Pearl Street
Buffalo, New York 14202

Attorneys for Named Respondents